**PENGURUSAN DANAHARTA NASIONAL BHD**

**v.**

**ASMAH ABDULLAH**

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: MT3-22-149-1998]
16 NOVEMBER 2001

***CIVIL PROCEDURE:*** *Summary judgment - Appeal - Appeal against decision of Senior Assistant Registrar - Whether defendant has raised any triable issues - Whether appeal should be allowed - Section 14(6)(c) Pengurusan Danaharta Berhad Act 1998 - Order 16 Rules of the High Court 1980*

In this appeal by the defendant against summary judgment, the defendant raised the following issues: (i) that summary judgment should not have been entered for the plaintiff, as there existed a collateral contract in that the defendant was an agent to one Ch'ng Ping Teong for a loan facilty; (ii) there was delay on the part of the plaintiff in disposing the shares which were charged to the plaintiff; (iii) plaintiff had failed to mitigate the loss of damages; (iv) there was uncertainty as to the defendant's debt; and (v) that there was modification and variation of the agreement between the plaintiff and the defendant. Pursuant to an order of substitution, the present plaintiff herein, Pengurusan Danaharta Nasional Berhad replaced the original plaintiff ie MBf Finance Berhad.

**Held:**

**[1]** The allegation pertaining to the existence of a collateral contract involving a third party would tantamount to raising a defence of fraud, duress, coercion, undue influence or misrepresentation as envisaged in s. 14(6)(c) of the Pengurusan Danaharta Berhad Act 1998 and this has been expressly precluded thereby. (p 514 e)

**[1a]** Furthermore, the documentary exhibits expressly stated that the parties thereto were the plaintiff and the defendant, and nothing turned on the name of the so called principal, ie one Ch'ng Ping Teong. The said Ch'ng had neither affirmed any affidavit to the effect that he was the principal nor has the defendant named the said principal as a third party to the proceedings under O. 16 of the Rules of the High Court 1980, thereby rendering the issue not triable. (p 514 g-i)

**[2]** The chronology of events showed that when the facility agreement for an agreed security margin was breached, demands to remedy the breach, followed by the termination of the credit facility and the filing of the writ herein were acted upon with reasonable promptitude by the plaintiff. Hence, the allegation of delay cannot be sustained. (p 515 c-d)

**[3]** The allegation of uncertainty of debt was also not a triable issue as the plaintiff was served with a notice of demand wherein the sums owed or payable were set out. This was followed by a certificate of indebtedness and the writ herein which was itself a notice. (p 516 c-d)

**[4]** The last issue alleged by the defendant was based on the variation of interest rates without any notice to the defendant. However, the defendant was not able to rely on this ground as the plaintiff had informed the increase in interest rates to the defendant by a letter served on 17 December 1997. (p 516 f)

*[Appeal dismissed.]*

**Case(s) referred to:**

*Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14* ***(refd)***

*Bumiputra Merchant Banker Berhad v. The Melewar Corporation Bhd & Ors [1990] 2 CLJ 30; [1990] 1 CLJ (Rep) 654* ***(refd)***

*Cuckmere Brick Co Ltd & Anor v. Mutual Finance Ltd [1971] Ch 949* ***(refd)***

*Hong Leong Finance Ltd v. Datuk Mohd Salleh Yusof [1989] 2 MLJ 129* ***(refd)***

*Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516* ***(refd)***

*National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283* ***(refd)***

*Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124* ***(refd)***

*Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305* ***(refd)***

*Wong Tham Meng v. Tiang Eng & Anor [2001] 6 CLJ 548* ***(refd)***

**Legislation referred to:**

Evidence Act 1950, s. 92

Pengurusan Danaharta Nasional Berhad Act 1998, s. 14(6)(c), (i), (7)

Rules of the High Court 1980, O. 14 r. 2, O. 16

*For the defendant/appellant - Arham Rahimy Hariri; M/s Kumar Jaspal Quah & Aisah*
*For the plaintiff/respondent - Rajashree Suppiah; M/s Cheang & Ariff*

*Reported by Raja Vishnu Sivarajah*

## JUDGMENT

**Low Hop Bing J:**

**Appeal**

This is the defendant's appeal against the decision of the learned senior assistant registrar who had on 30 January 1999 allowed the plaintiff's application by way of summons in chambers in encl. (5) for summary judgment against the defendant under O. 14 of the Rules of the High Court 1980.

**Submission For Defendant**

Arham Rabimy Hariri, learned counsel for the defendant, submitted that summary judgment should not have been entered for the plaintiff, as there existed a collateral contract in that the defendant was an agent to one Ch'ng Ping Teong for the loan facility of RM15,000,000.

It was also contended for the defendant that there was delay on the part of the plaintiff in disposing of the shares which were charged to the plaintiff.

The defendant also submitted that the plaintiff has failed to mitigate the loss of damages. In addition, it was canvassed that there was an uncertainty as to the defendant's debt.

The defendant also relied on the argument that there was a modification and variation of the written agreement between the plaintiff and the defendant.

It was finally contended for the defendant that there are other reasons which require a full trial and that the appeal should be allowed with costs.

**Plaintiff's Case**

In response to the aforesaid submission, Rajashree Suppiah, learned counsel for the plaintiff, informed the court that the present plaintiff is Danaharta Nasional Berhad and submitted that the defendant has no defence or issue to be tried.

On the question of collateral contract, the plaintiff relied on s. 14(6)(c) and (i) of the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Act") and said that allegations of this nature may not be raised against the plaintiff.

On the alleged delay on the part of the plaintiff in disposing of the shares in question, the plaintiff relied on the documents and replied that this is without merit as it is not a triable issue.

It was submitted for the plaintiff that the alleged uncertainty of the defendant's debt is unsubstantiated, so also the alleged modification and variation of the agreement between the plaintiff and the defendant.

Finally, it was contended that there are also no other reasons for a full trial to be held and so it was urged for the plaintiff that the appeal herein should be dismissed with costs.

**Decision Of The Court**

*Compliance With O. 14 r. 2*

From the pleadings and the affidavits filed by the parties herein respectively, there is no dispute that the statement of claim has been served on the defendant who has entered an appearance and that the plaintiffs affidavit in support of the application has complied with O. 14 r. 2 of the Rules of the High Court 1980. It was held by the Federal Court in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 that once the plaintiff has fulfilled these preliminary requirements, a *prima facie* case has been established by the plaintiff and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court as to why judgment should not be given against him. (See also *Wong Tham Meng v. Tiang Eng & Anor* [2001] 6 CLJ 548).

**New Plaintiff**

Pursuant to a certificate of vesting dated 24 April 1999, the original plaintiffs rights, title and interest became vested in the new plaintiff ie, Pengurusan Danaharta Nasional Berhad, which is now governed by the Act. Section 14(7) of the Act provides that the vesting certificate is conclusive evidence of the vesting with effect from 24 April 1999. The new plaintiff therefore replaces the original plaintiff pursuant to an order of substitution granted by this court on 26 April 2000.

**Collateral Contract**

The long title of the Act establishes the purpose of the Act in the following words:

> An Act to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by the Corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by the corporation and for matters connected therewith or incidental thereto.

The provisions of s. 14(6)(c) and (i) of the Act are pertinent here and hence reproduced as follows:

> (6) Without prejudice to the generality of subsection (1), (2), (3), (4) or (5), in any proceeding brought by or against the corporation in respect of any

asset vested in the Corporation pursuant to this section, no person shall raise as a claim or defence to such proceedings any of the following matters, unless such claim is a disclosed claim:

(a) ...;

(b) ... ;

(c) any person was a party to or privy to any fraud, duress, coercion, undue influence, or misrepresentation;

(d) ...;

(e) ...

(f) ...

(g) ...

(h) ....

(i) there is an error in any statement of account issued by the seller or any other person in respect of any debt to which the asset relates.

Except in the case of a "disclosed claim", the above provisions clearly preclude a person from raising e.g. as a defence that any person was a party or privy to any fraud, duress, coercion, undue influence or misrepresentation; or that there is an error in any statement of account issued by the seller or any other person in respect of the debt to which the assets relate. There is no submission by the defendant that the case before me comes within the ambit of a "disclosed claim".

The allegation pertaining to the existence of a collateral contract involving a third party as the principal of the defendant and the officers of the original plaintiff and the method for obtaining the facility in question would in my mind be tantamount to raising a defence of fraud, duress, coercion, undue influence or misrepresentation as envisaged in s. 14(6)(c) and this has been expressly precluded thereby.

In addition, the contemporaneous documentary exhibits such as the facility agreement and the share deposit memorandum clearly and expressly state that the parties thereto are the plaintiff and the defendant, and nothing turned on the name of the so-called principal ie, one Ch'ng Ping Teong. It was the defendant who in her own right executed all these contemporaneous documentary exhibits. The defendant's allegation or assertion of facts was apparently inconsistent with undisputed contemporaneous documents, in which case, as the judge, I have a duty to reject such assertion, thereby rendering the issue not triable: *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14.

Further, the said Ch'ng Ping Teong has not affirmed any affidavit to the effect that he was the principal. The defendant has also failed to name the said principal as a third party to these proceedings under O. 16 of the Rules of the High Court 1980.

Section 92 of the Evidence Act 1950 provides for the exclusion of oral evidence to contradict, vary, add to or subtract from the terms of the contract as contained in the aforesaid contemporaneous document exhibits: *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124.

**Alleged Delay By Plaintiff's Disposal Of Shares**

The short answer to this allegation is to be gathered from the undisputed facts showing that the agreed security margin under the memorandum of charge and the facility agreement was breached on or around 18 December 1997, pursuant to which, demands to remedy the breach were made on 23 December 1997 and 7 January 1998, followed by the termination of the credit facility on 20 January 1998 and the filing of the writ herein on 16 February 1998. The realisation of the shares in question was effected in May 1998. The above chronology of events would show that the allegation of delay cannot be sustained as the plaintiff had at all material times acted with reasonable promptitude.

The duty imposed on a chargee of shares has been decided in a number of cases, one of which is *Hong Leong Finance Ltd v. Datuk Mohd Salleh Yusof* [1989] 2 MLJ 129, where LP Thean, J of the Singapore High Court held, *inter alia*, as follows:

> The plaintiffs, as a mortgagee, after the power of sale had arisen, were entitled to sell the shares at such time as they think fit and in selling the shares they were under a duty to act in good faith and to obtain the true market value therefor at the date or dates when they were sold. They were under no obligation to wait for the market to turn and improve.

The above dicta followed the judgment of Salmond, LJ (as he then was) in *Cuckmere Brick Co Ltd & Anor v. Mutual Finance Ltd* [1971] Ch 949 at p. 965, which was also applied by our Court of Appeal in *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 1 MLJ 662, 672 where it was held that:

> The bank had a narrow duty to take reasonable precautions to obtain the true value of the property at the time of sale, and was required to act in good faith, but unless there was evidence of deliberate or wilful misconduct on the part of the bank, the 'duty to take reasonable precautions' would not be extended to cover every possible step an altruistic financier could have taken regardless of time, cost or effort. [per Shankar JCA (as he then was)]

In any event, the memorandum of deposit of shares and the facility agreement herein contain express provisions giving absolute discretion to the plaintiff as chargee with regard to the time for the disposal of the shares. The plaintiff as chargee of the shares has the right to choose the time to sell and to realise the true value of the shares sold, but not e.g. to watch the market closely and to sell only at one given time when the prices are high: *Bumiputra Merchant Banker Berhad v. The Melewar Corporation Bhd & Ors* [1990] 2 CLJ 30, 32; [1990] 1 CLJ (Rep) 654 per Siti Norma Yaakob, J (now FCJ).

In the circumstances, I hold that this allegation by the defendant is not a triable issue.

**Alleged Uncertainty Of Debt**

This is also not a triable issue as the plaintiff has been served with a notice of demand wherein the sums owed or payable were specifically set out. This was followed by a certificate of indebtedness and the writ herein which itself is a notice: *Public Bank Bhd v. Chan Siok Lie & Ors* [1989] 2 MLJ 305. If at all the defendant is uncertain as to the extent of her own indebtedness, the least a prudent debtor such as the defendant could be expected to do is to make enquiry as to her own indebtedness in her own account with the plaintiff.

Section 14(6)(i) of the Act, as alluded to above, also militates against the defendant in that the defendant is precluded from raising as a defence that there is an error in any statement of account issued by the original plaintiff or the new plaintiff in respect of the debt in the instant case.

**Alleged Modification Or Variation Of Contract**

This was raised by the defendant allegedly based on the variation of interest rates without any notice to the defendant. However, encl. (21), exh. SSO-SD is the plaintiff's letter dated 17 December 1997 which was served on the defendant informing the defendant of the increase in the interest rate by 1% to 4% per annum above the base lending rate.

**Conclusion**

By reason of the foregoing grounds, I hold that the decision of the learned registrar giving summary judgment to the plaintiff under O. 14 is correct and is hereby upheld. In the circumstances, I dismiss the defendant's appeal with costs.